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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 658

ABE BENDER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No.

ABE BENDER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

The petitioner, Abe Bender, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENTS AND OPINION OF THE COURTS BELOW.

The judgment and sentence of the United States District Court for the Northern District of Illinois, Eastern Division was entered April 22, 1954 and is not reported, but is printed in the Record filed herewith at Page 438.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed

January 12, 1955 and is not yet reported but is set forth in the Appendix hereto, and in the certified copy of the Record.

JURISDICTION.

On February 15, 1955 the United States Court of Appeals for the Seventh Circuit entered its order denying a Petition for Rehearing in this cause. This petition is filed within thirty (30) days of the denial of the Petition for Rehearing by the United States Court of Appeals for the Seventh Circuit.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED.

1. Did the Trial Court's erroneous contradiction of crucial evidence in the record and limitation of argument to the Jury, so prejudice the defendant's theory of the case, that he was denied the right of trial by Jury?

2. May a Court of Appeals, in review of a criminal conviction, make conjecture as to the effect and meaning of crucial evidence in the record, which the Trial Court stated in the presence of the Jury, was not given, and thus substitute for the Jury?

3. Did the Trial Court so improperly instruct the Jury, that the errors should be held prejudicial and reversible, where strict compliance with Rule 30 of the Federal Rules of Criminal Procedure by the Trial Court and the defendant did not occur?

4. Was the Government improperly and prejudicially excused from its burden of proof beyond a reasonable doubt, where the circumstantial evidence, given reasonable inference, was consistent with ignorance and negligence, rather than wilful intent to evade?

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STATUTES INVOLVED.

The pertinent provisions of the Internal Revenue Code are cited as follows:

26 U.S.C.A. Section 145(b), 52 Stat. 513
26 U.S.C.A. Section 21(a), 52 Stat. 457
26 U.S.C.A. Section 22(a), 52 Stat. 457, 53 Stat. 575
26 U.S.C.A. Section 23(a), 52 Stat. 460

Federal Rules of Criminal Procedure
Rule 30
Rule 52(b)

These provisions are set out in full in the Appendix hereto.

STATEMENT OF THE CASE.

The petitioner was convicted by a jury as charged by a single count indictment charging wilful attempt to evade income taxes by filing a false and fraudulent income tax return for the year 1946 in violation of Title 18, U.S.C., 145(b). He was sentenced by the United States District Court for the Northern District of Illinois to imprisonment for two years and a fine of $5000. (R. 438).

The United States Court of Appeals for the Seventh Circuit affirmed the conviction and denied rehearing. (Appendix to Record).

The petitioner, for many years, has been a partner with his brother, Ben Bender, in the barrel cooperage business. No question of the validity or correctness of return of income from this business is involved. (R. 46).

In 1946 the petitioner, as an individual, engaged in the purchase for and sale to various cordial bottlers of sugar syrup used in their products. These cordial bottlers were

customers of Bender Brothers cooperage products and services.

Petitioner's tax return for the year involved, 1946, and for years prior thereto and since were prepared by Louis Kraus. Kraus testified that he was not a licensed accountant, but had been employed by a firm of Certified Public Accountants from 1945 to 1947, and in such employment audited the books of Bender Brothers Cooperage Company and prepared the tax returns of the partnership and brother partners. (R. 300).

Early in March, 1947 in preparing the tax return of the petitioner, Kraus was told by the petitioner that he had transactions to be included in his personal return and from invoices, handed him by the petitioner prepared a "work sheet" introduced as Exhibit 55, (a copy of this exhibit is appended to this petition). (R. 306).

Kraus asked what they related to, and was told by the petitioner that the invoices involved syrup transactions and that these invoices were the only records the petitioner had (R. 306, 307). After computing from Exhibit 55, the difference between purchases and sales, Kraus entered these totals and the difference, with no other deductions (such as cartage or other business expenses), as income from other business, on the petitioner's income tax return, added it to partnership income, and tax was paid thereon. He stated that he never showed Exhibit 55 to the petitioner, and that he, Kraus, made out the check to the Collector for the tax, and Bender signed the return and check, and Kraus then filed them before March 15, 1947 (R. 310, 311).

A witness from the Internal Revenue Bureau stated the tax was paid by tax prepaid with estimates in 1946, a credit for overpayment in 1945, and a check for the dif-

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ference which accompanied the final return (R. 505), and that there was no additional tax assessed against the petitioner for the year 1946 (R. 58).

Exhibit 55 (Appendix P. 13a) contains substantial mathematical errors acknowledged by Kraus to be his. He never showed it to the petitioner or discussed it with him, and all evidence in the record shows that the petitioner never saw the document to read it. This is probably because he cannot write, and reads with difficulty, as demonstrated by the fact that no Government witness, including his customers, banker, and accountants ever saw him do more than write his signature on checks or documents which were prepared for him by others. (R. 235, 268, 281, 299, 319).

The Government's evidence can be summarized as consisting of the testimony and records of customer witnesses who had purchased syrup from the petitioner in the year 1946, and evidence of such sales which was admitted by the Trial Court showed a total of sales which exceeded the amount of sales reported by the petitioner by $23,179.30 (R. 359). Cross examination of one of the customer witnesses, Sidney Waller, showed that $6800.00 worth of the syrup sold to him had been returned to the petitioner because it was unsatisfactory and because it could not be used (R. 171, 175), and the petitioner refunded that amount to Waller's company. There was no proof that it was resold or was on hand at the close of the year. Exhibit 55 shows that the first purchase listed thereon and credited to Bender was on March 7, 1946. There are, however, two (2) sales charged to him on Exhibit 55 as of January 7, 1946 in the amounts of $4,195.80 and $2,827.50, respectively (Appendix 13a). In addition thereto evidence was admitted concerning a sale not listed on Exhibit 55, which sale occurred January 7th,

in the amount of $2,929.50. Thus, there were three (3) sales in the total amount of $9,952.80 for which no cost of merchandise was credited to Bender, the petitioner.

Agent Krane (R. 358-360) summarized the testimony of the customer witnesses and gave the figure of $23,179.30 as gross receipts from sales not listed on Exhibit 55, and thus inferred that these receipts represented concealed income upon which tax was due and was not reported in the income tax return of the petitioner.

Agent Ruggaber was permitted to testify, over objection (R. 370-372), that a tax deficiency of $13,910.34 would exist. The objection stated: (1) That the figure upon which the tax computation was based was not before the Jury, (2) The figure did not comprehend any allowable deduction from additional gross receipts, (3) The figure did not comprehend or include all factors in the record, which were pertinent to the computation (R. 370-371). Cross examination as to the effect on the alleged tax deficiency of exclusion of the $6800.00 item of unsatisfactory goods, returned because unusable, was denied (R. 374).

A Motion for Acquittal at the close of the Government's evidence was denied and the defendant rested his case without introducing any evidence. At this point the Trial Court held a conference with the attorneys for the parties concerning proposed instructions. This conference was attended by the Court Reporter, but was not recorded. The Trial Court referred to this discussion in chambers, and the fact that he had altered the language of some of the instructions proposed and discussed, in a colloquy, which appears at Pages 425 and 426 of the Record.

The Jury returned a verdict of guilty as charged and a Motion for New Trial was overruled (R. 436, 437). The defendant was sentenced to two (2) years in the custody of the Attorney General and fined the sum of $5,000.00.

The petitioner appealed to the United States Court of Appeals for the Seventh Circuit and on January 12, 1955 the conviction was affirmed. A Petition for rehearing was denied on February 15, 1955. The orders and opinion of the Court of Appeals are appended to the Certified Copy of the Transcript of Record, which was printed for use by the Court of Appeals. A copy of the opinion of the Court of Appeals is also appended to this petition.

REASONS FOR GRANTING THE WRIT.

I.

Under the evidence admitted by the Trial Court for the consideration of the Jury, the Government was entitled to the inference and conclusion that $23,179.30 of gross receipts from syrup sales had been received by the petitioner during the year 1946, over and above the amount reported by the petitioner as total receipts in his income tax return, which showed total receipts of $84,583.94. It was also entitled to the inference that this $23,179.30 of receipts was not included on Exhibit 55, which was the work sheet prepared by his auditor from papers furnished by the petitioner.

It is the contention of the petitioner that this proof of additional gross receipts from the sale of merchandise *capital goods* was not necessarily and conclusively, proof beyond a reasonable doubt of wilful attempt to evade taxes by a false or fraudulent return, but was merely a circumstance which would tend to support such a conclusion. *Goodrich* v. *Edwards*, 255 U.S. 527, 535; *Hoffer-*

bert v. *Anderson Oldsmobile*, 197 F. 2nd 504, hold there is no income until a gain is realized.

Under these conditions, it is respectfully urged that in a criminal trial in the Federal Courts for wilful attempt to evade income taxes, all of the circumstances, both for and against the guilt, are for the consideration of the Jury and that evidence and argument from that evidence, tending to show negligence, ignorance and lack of wilful intent to commit the crime charged, cannot properly be excluded from the Jury's consideration by obviously mistaken and erroneous action of the Trial Court. It is the contention of the petitioner that the Trial Court in this cause committed such mistake and error, and that the Court of Appeals below has erroneously affirmed and condoned such action by the Trial Court.

In argument to the Jury by the counsel for the petitioner, argument was made in reference to three sales in the respective amounts of $4,195.80, $2,827.50 and $2,929.50, all of which occurred January 7, 1946. The total of these sales was $9,952.80. These sales, on January 7th, were sixty (60) days prior to the first cost of merchandise indicated on Exhibit 55, which contained all of the cost of merchandise items with which the Government expert witnesses gave the petitioner credit. There was no proof of prior inventory, or of any inventory in the hands of the petitioner at the beginning or at the end of the year 1946.

It is thus urged that it was a reasonable argument to the Jury that these sales, totaling almost $10,000.00, could reasonably have been the result of a cost of merchandise in similar amounts. If there was added to this $9,952.80 the amount of $6800.00, which the petitioner returned to one of his customers for merchandise which was unsatisfactory and could not be used, then a total of $16,752.80

could, reasonably and consistently with the evidence have been credited to the petitioner, by the Jury as a deduction from the $23,179.30. And thus, on the petitioner's theory of the case, the Jury would have had before it a balance of alleged unreported income in the sum of $6,426.50, as gross unreported income, upon which tax could be assessed.

It is submitted that the Jury might well have refused to draw the conclusion of wilfulness and intent to evade and defeat a tax based on such a figure, when the petitioner had reported sales of syrup in the amount of $84,583.94.

In any event such a decision was for the Jury, and not for the Trial Court, or the Court of Appeals, and neither may properly substitute its conclusion for that of a Jury.

Such facts, argument and inferences were eliminated from the Jury's consideration by action of the Trial Court, which appears at Pages 401 and 402 of the Record, submitted herewith. The following occurred in the course of argument on behalf of the petitioner:

> By Mr. Walsh:
>
> "Well, I beg your pardon for not being too logical all the time or too orderly in following these things. But to go back to this Exhibit 55. Here is a sale January 7, $4195.80; another one $2827.50. I believe there was testimony concerning one for $2229.50. That isn't on this sheet.
>
> "Of course, we know this sheet is all right, or we are asked to assume it is all right because Kraus said he put down everything Bender gave him. But, ladies and gentlemen, where did the syrup come from that was sold on January and February? There is no purchase shown here until March 7th.
>
> "I want Mr. Kralovec to give us the answer to that one.
>
> "If he says it was inventory, there is no evidence here that there was inventory. Don't let them guess

there was. Ladies and gentlemen, you have to buy what you sell unless you are born with it or inherit it or somebody gives it to you.

"Now $4195 and $2827 and $2929—of course, I just did this with my fountain pen, but I come out with $11,718.80, and $6800 of it unsatisfactory that he took back.

"He didn't take that back to resell it. That isn't the inference you must take from this evidence. He took it back because it was no good.

"Mr. Kralovec: I object. There is no testimony that it was no good.

"Mr. Walsh: The testimony is that it was unsatisfactory merchandise, and I think it is a fair argument.

"Mr. Kralovec: Counsel has stated what he believes is a fact, from the testimony, and there was no such testimony to that effect. It was testified, I submit, that that was reported on the books as a sale. There is no indication or characterization of what condition that merchandise was in.

"The Court: I do not recall any evidence of the fact that the goods were not satisfactory, Mr. Walsh. I will sustain the objection and ask the jury to disregard that phase of Mr. Walsh's argument.

"Mr. Walsh: Unless their conclusion is different from that of the Court regarding that testimony. May we have that reservation?

"The Court: No. I will let my remarks stand in the record.

"Mr. Walsh: The defendant would like an exception to "that phase."

"The Court: You may note your exception.

"Mr. Walsh: Thank you.

"Well, then, ladies and gentlemen, as long as Mr. Kralovec objects to that, let me ask you to reason, to adopt any reasonable conclusion you can as to why that goods was returned, what may have happened. There is no evidence in any event that it was ever resold. It was returned in October, and there is no evidence that it was ever resold."

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The evidence upon which the petitioner rests his contention that the Trial Court mistakenly and erroneously contradicted the Record, appears at Pages 171 and 175 of the Record. At Page 171 the following cross examination of the witness Waller appears:

By Mr. Walsh:

"Q. And in that statement, did you tell the Government officers about all of your transactions with Abe Bender in 1946 in that conversation?

"A. I think so, all of the—yes, I did tell them of the transactions that I could remember or that I could find or that I could trace through the books.

"Q. Now, were there any discounts or rebates made to you in connection with these transactions?

"A. No, sir.

"Q. Any refunds?

"A. I might say this that there was a refund made in a substantial quantity due to the inability of the company to use a certain amount of material.

"Q. Then a part of this material which you have testified about here this morning, and which is covered by these documents, is that right—

"A. That is right.

"Q. —was returned, is that true?

"A. That is true.

"Q. And the money paid for that material was refunded to your company?

"A. Yes, sir, that is right.

"Q. By Abe Bender?

"A. That is right."

At Pages 174, 175 of the Record, on re-direct examination by the prosecutor, the following occurred:

"By Mr. Kralovec:

"Q. Now, Mr. Waller, earlier in your testimony on cross examination, before we got into your last explanation about a rebate and refund, when you earlier referred to a refund, did you mean a sale by you to Bender?

"A. Well, actually it wasn't a sale. In business if we return merchandise to the person we buy it from,

we don't consider it a sale. We merely dispose of a purchase because of some reason or other.

"I would hardly call that either a rebate or a sale. As a matter of fact, it was a return of merchandise which we had purchased that we found unsatisfactory."

At the bottom of Page 175, the Trial Judge took over examination of the witness Waller and the following occurred on Pages 175 and 176 of the Record:

"Q. What was the amount, Mr. Waller?

"A. $6,800.00.

"Q. Do you know whether you issued a sales invoice or some such document to Bender for that particular transaction?

"A. We made out a sales invoice for it.

"The Court: Why? That wasn't a sale of goods, was it?

"The Witness: It was a means of keeping a record of something that somebody owed us money, your Honor. We had money coming.

"The Court: Why didn't you get a credit memorandum from Mr. Bender?

"The Witness: Actually the reason for that was because we tried to keep Mr. Bender's account paid as closely as possible as we went along.

"The Court: But you weren't in the business of selling the kind of goods that Mr. Bender was in the business of selling.

"The Witness: No, but inasmuch as we always paid Mr. Bender for the merchandise we purchased from him, when we found that we had already paid for these goods, we asked Mr. Bender to pay us back what we had already given him.

"The Court: I understand that, but I would like to know why you described it on your books as a sale of goods. You returned goods for which you got credit, is that right?

"The Witness: Exactly.

"The Court: And he refunded the sales price, isn't that right?

"The Witness: Yes, but—

"The Court: That is all."

In the face of this evidence the Trial Judge stated, in the presence of the Jury, upon the prosecutor's objection to argument by counsel for the petitioner, that the Judge did not recall any evidence of the fact that the goods were not satisfactory. The refusal to permit the question of the existence of such testimony to remain for the Jury's recollection and conclusion is incomprehensible, and obviously mistaken and prejudically erroneous.

The implications flowing from the Court's remarks, and their effect upon the Jury, could not fail to be substantial. Counsel for the petitioner was branded in the eyes and minds of the Jury as being guilty of a misrepresentation of the evidence and as attempting a fraudulent argument.

The Court of Appeals below, in affirming and condoning this action by the Trial Court, treated the matter, at Pages 4 and 5 of its Opinion, and in part said:

> "Actually the evidence showed that the syrup was returned because it was unsatisfactory. Mr. Waller, Vice President and Treasurer of Sunset, Incorporated, the company which returned the syrup in question, testified that "it was a return of merchandise which we had purchased that we found unsatisfactory". Apparently the defendant was trying to make the jury think that the deficiency in income reported on his tax return should be reduced by $6,800.00 because he had to refund that amount and received in return syrup that was of no value. If this was defendant's purpose, the court was correct in striking out his statement. The evidence we have set out above was that Sunset returned the syrup because it was "unsatisfactory", and to us this means not suited for Sunset's purposes. This description does not neces-

sarily mean that the returned syrup was valueless to the defendant as his term, "no good", would indicate."

The petitioner submits that the Court of Appeals erred in justifying the exclusion of the argument and the evidence from the Jury's consideration, by substituting its conclusion as to the meaning of the evidence, and its weight and effect, for that of the Jury.

The statement by the Court of Appeals, at Page 5 of its Opinion, to the effect that the entire objection was without merit because the exclusion of the $6800.00 item would still have left $17,000.00 of unreported income, ignores and avoids the significance of the argument made on behalf of the petitioner. This argument, based upon evidence in the Record and proper for the Jury's consideration, would have reduced the amount of unreported income to $6,426.50, as demonstrated heretofore. Upon this amount additional tax would have been negligible as compared to the tax deficiency of $13,910.34 testified by the expert witness agent Ruggaber, who answered, over objection that his computation ignored factors of cost of goods for the sales of January 7th and the $6800.00 loss incurred by reason of the unsatisfactory and unusable merchandise returned by the witness Waller's company.

The action of the Trial Court and the Opinion and Order of Affirmance by the Court of Appeals were contrary to decisions of this Court and decisions of the Courts of Appeals.

The conclusion of the Court of Appeals below that the petitioner's objection to the conduct of the Trial Court was without merit might be considered in the light of language by this Court in *Bollenbach* v. *United States*, 326 U.S. 607, at Page 611 where this Court said:

"We can pay no attention to this misdirection only by assuming that the jury paid no attention to it and that the case is before us as though no misdirection had been given."

At Page 612 of the *Bollenbach* decision, the Court cited the following language:

"In a trial by jury in a Federal Court, the Judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law." Quercia *v.* United States, 289 U.S. 466, 469 and "The influence of the trial Judge on the jury is necessarily and properly of great weight," Starr *v.* United States, 153 U.S. 614, 626, and then said "and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the Judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

In *Starr* v. *United States,* 153 U.S. 614, 626 Mr. Chief Justice Fuller said:

"It is obvious that under any system of jury trial the influence of the trial Judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference, and may prove controlling."

In *Quercia* v. *United States,* 289 U.S. 466, 470 it is said:

"This privilege of the Judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses."

The Court of Appeals for the Seventh Circuit in *United States* v. *Meltzer,* 100 F. 2nd 739 discussed the effect of a Judge's comment upon the evidence at great length, and cited many decisions of this Court and of other Courts of Appeals upon the effect of a Trial Court's comments or statements concerning the evidence. A conviction there was reversed because a trial Judge's comments upon the evidence had the effect of removing the decision on vital evidence from the province of the jury.

The obvious and prejudicial error of the trial Judge in the case at bar removed the determination of crucial evidence from the consideration of the Jury and denied to the petitioner the right of argument to the jury upon such evidence, and destroyed the petitioner's theory of the case. The ultimate effect was the denial of the right of trial by jury as guaranteed by the Constitution of the United States.

The Court of Appeals below has rendered a decision in conflict with the decisions of this Court and with other decisions of the same Court of Appeals, and has sanctioned a departure from the accepted and usual course of judicial proceedings, which calls for an exercise of this Court's power of supervision.

II.

The Court of Appeals below disposed of objections raised to the instructions to the Jury, by stating that the objections made in the trial Court were unintelligible and that objection could not be raised for the first time on appeal.

The petitioner asked on appeal that the errors in the instructions be noticed as plain and palpable error under Rule 52(b) of the Federal Rules of Criminal Procedure.

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It was and is further urged that the Trial Court failed to comply with Rule 30 of the Federal Rules of Criminal Procedure when the Judge failed to inform counsel fully and accurately of action on requested instructions before argument to the Jury and before the Court instructed the Jury. This action so hampered and confused the attorney for the petitioner, that he was unable to make proper and fully detailed objections before the Jury retired.

The event in this District Court, in the case at bar, of failure by the Court to comply with Rule 30 requires the exercise of this Court's supervisory jurisdiction.

In the case at bar, the Court of Appeals ignored the errors in the instructions to the Jury and apparently refused to consider the application of Rule 52(b), which authorizes a Court of Appeals to notice plain and substantial error which prejudices the petitioner's rights. *United States* v. *Raub*, 177 F. 2nd 312, 315, and cases cited therein.

No notice was taken of the Trial Court's failure to comply with Rule 30 by informing counsel before argument to the Jury of action on proposed instructions. This duty of the Trial Court is just as much the command of Rule 30 of the Federal Rules of Criminal Procedure, as that part which bars assignment as error where sufficient objection is not made. *Ross* v. *United States*, 180 F. 2nd 160, 165.

In the case at bar, the Trial Court held a conference, which lasted half a day, which conference, however, was not recorded by the official Court Reporter. At this conference, at the conclusion of all testimony, the Court indicated certain rulings and marked certain offered instructions of the petitioner "refused". These are in the Record at Pages 431 to 434.

The fact of this conference is attested by the following excerpt from the Record, which appears at Pages 425 and 426, and which occurred *after* the Jury had received its instructions from the Court:

> "The Court: I would like to have Mr. Kralovec look them over. Since our discussion in chambers, with the agreement of the Government, they are given two or three instructions covered by your request, Mr. Walsh. I may be mistaken about these. I tried to alter those which I previously indicate I would refuse to give.
>
> "Mr. Walsh: In some of those very likely the language is a little different.
>
> "The Court: Well, I believe I have given the substance of what you asked for. There are some that I disapproved of altogether.
>
> "Mr. Walsh: This one was given. I will withdraw it. Take out 21. That was given, your Honor.
>
> "The Court: You understand that the Court is not obligated to use the language submitted by counsel. I hope I never get to the point where I cannot formulate my own charge. I have given some of your requests, or I have included some of your requests in my charge in language that may be different from yours, but containing substantially the principles of law which you discussed.
>
> "I think in some respects I went even further than you requested me to, so far as the defendant is concerned."

Just before argument to the Jury was commenced a colloquy occurred, which further supports the petitioner's contention that the Trial Court did not comply with Rule 30 (R. 377-380).

The attitude of the Court toward consideration of objections to the instructions with a view to correcting them before the Jury retired is clearly demonstrated by the following remark, at Page 427 of the Record:

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"The Court: Can we shorten this, Mr. Walsh, by letting me say that I will note in the record an objection by the defendant to each and everything I said."

This remark emphasizes the obvious haste of the Trial Court to speed the case to the Jury for consideration upon the instructions that he had formulated and already given them. The opportunity given for objection was totally inadequate and consisted of a few moments reluctantly allowed to counsel between the completion of oral instruction to the Jury and the Jury's retirement to consider their verdict.

It is submitted that it is impractical and difficult, if not impossible, for any lawyer to formulate intelligent and detailed objections to an oral charge in an income tax case, when the charge covers nine (9) pages of the Record (R. 415-424), where the language and much of the substance of the charge is heard for the first time.

The instructions to which the petitioner makes objection and considers to be plain error referred to (a) circumstantial evidence, (b) determination of tax liability, and (c) responsibility and implication of wilfulness on the part of the defendant.

(a) The Court told the Jury that the case need not be proved by direct and positive testimony (R. 418). At the bottom of Page 418, the Court said:

"The law demands a conviction where there is sufficient legal evidence to show a defendant's guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence." and then said, "I should like to add that circumstantial *evidence* is *proof* of such facts and circumstances surrounding the acts and conduct of the party charged as to exclude every reasonable hypothesis except guilt." (Emphasis supplied).

The Government's theory of the case rests upon evidence of the circumstances of receipt of undisclosed gross receipts from the sale of capital property, that is, in the case at bar, syrup. From this circumstance it was the Government's theory that all of such receipts were income subject to income taxes.

The defendant offered no evidence, and the only evidence to which the Court could refer was that of the Government. This evidence was described as circumstantial by the Court's instructions. Certainly it was incorrect to tell the Jury that "circumstantial evidence" is "proof" as to exclude every reasonable hypothesis except guilt.

In the recent decision of this Court, *Holland* v. *United States,* decided December 6, 1954, 348 U.S. Adv. Sheets 121; 99 L. Ed. Advance Sheets 127, 139, this Court considered an instruction concerning the exclusion of every reasonable hypothesis, other than that of guilt, where the evidence is circumstantial. It was said that although there was support for this type of instruction, it would be confusing and incorrect if the Jury was properly instructed on the standards for reasonable doubt.

The instruction given by the Trial Court in this case was in different language and inaccurately stated the proposition. It was more than confusing and incorrect, because it was argumentative of guilt.

(b) The Court did not properly charge the jury concerning the law on determination of tax.

At page 421 of the Record, the Court very loosely paraphrased the statutes and regulations on computation of gross income. Then it informed the jury in the last sentence that deductions from gross income were not *pertinent* in this case.

A little later, at Page 423 of the Record, the Court made an additional reference to the computation of tax and referred back to the instruction in which it told the jury that deductions were not pertinent in this case. Its only reference to the allowance of cost of products or goods sold, was a casual reference preceded by words "I might say."

It is submitted that this instruction did not properly follow the law and was unfair to the defendant's theory of the case and, undoubtedly, the total effect of such instruction was to confuse the jury, and to fail to inform them properly of the lawful methods for determining tax, and the statutory basis of the charged offense. The statutes which control and should be the basis for this instruction are appended to this Petition.

It was unreasonable and confusing for the Jury to be instructed as to deductions from gross receipts, prescribed by law, for computation of taxable income and then be instructed that these deductions prescribed by law were not pertinent in this case.

(c) It is further respectfully submitted that on the question of wilful intent, the Trial Court practically directed a verdict of guilt.

At Page 422 of the Record the following instruction given to the Jury appears:

> " 'Willfully' mean intentional and not by accident. You may find from the facts that when Abe Bender signed his individual income tax return for the year 1946 that he had knowledge of the contents of that return."

This instruction draws the doctrine of *respondeat superior* from the law of negligence and applies it to criminal liability. The crux of the offense charged is wilful-

ness. Under the evidence in the case it was a question for the Jury as to whether Bender, the petitioner, had knowledge of the contents of the return. A very similar instruction was condemned and held reversible error, not cured by other instructions, in a decision by the Sixth Circuit Court of Appeals in *Lurding* v. *United States,* 179 F. 2nd 419, 421.

See *Morisette* v. *United States,* 342 U.S. 246, 274, and *Screws* v. *United States,* 325 U.S. 91, 107, on submission of intent to Jury.

It is further submitted with regard to this last instruction that the petitioner substantially complied with Rule 30 of the Federal Rules of Criminal Procedure, by exception to this part of the Court's charge after instructions, and before the Jury retired.

The objection was as follows (R. 428):

> "The defendant further objects that the charge was erroneous in that the Court said to the jury they may find from the facts that the defendant Abe Bender knew substantially what his income tax was. Again, I may say that may be strictly a matter of hearing. The record should show it."

It is respectfully urged that the Court of Appeals below in disposing of the objections made to instructions decided this case in a manner contrary to other decisions of the same Circuit Court of Appeals and of other circuits. *United States* v. *Raub,* 177 F. 2nd 312, 315, and *United States* v. *Balodimas,* 177 F. 2nd 485, 488 are both decisions where the same Court of Appeals recognized the authority of Rule 52(b) as establishing the right and duty to notice plain error in instructions, even though strict compliance with Rule 30 of the Federal Rules of Criminal Procedure did not occur. The *Raub* decision, at Page 315, cites the decisions of other Circuits and of this Court in support of this position, *Williams* v. *United*

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States, 76 U.S. App. D.C. 299, 131 F. 2d 21; *Cave* v. *United States,* 8 Cir., 159 F. 2d 464; *United States* v. *Monroe,* 2 Cir., 164 F. 2d 471; *United States* v. *Perplies,* 7 Cir., 165 F. 2d 874; and *Screws* v. *United States,* 325 U. S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A.L.R. 1330.

The refusal of the Court of Appeals to review the plain errors in the Trial Court's instructions is sufficient cause for the exercise of this Court's jurisdiction upon certiorari.

III.

The petitioner was convicted in the trial Court and the conviction affirmed by the Court of Appeals on the following theory, as expressed by the Court of Appeals opinion, (see Appendix),

> "The defendant first contends that the court erred in denying his motion for acquittal at the close of the Government's case. The ground for the motion was the contention that the Government had not proved beyond a reasonable doubt that there was tax due, which required establishing not only undisclosed income but also a lack of any compensating deductions or exclusions. The defendant seems to contend that the Government here must prove all the facts necessary to show unpaid tax on net income in excess of all business costs and expenses and personal exemptions. But that is not required.
>
> "The tax payer's costs and other factors which would lessen his tax liability are peculiarly within his own knowledge. Accordingly, the law has placed upon him the burden of going forward with the evidence once the Government has established receipts in excess of those reported in his income tax return. As this court said in *United States* v. *Hornstein,* 7 Cir., 176 F. 2d 217, 220: 'The figures of cost of goods sold, as they were used in preparing his tax returns, were at least admissions by the defendant which the

government could utilize in making a prima facie case. The defendant was chargeable with them until he offered credible evidence to show that the figures were in error, and that his costs were greater.'

"If the defendant had additional costs or expenses that offset the unreported income established by the Government's case, the burden was on him to prove that *as part of his defense.* In his brief on appeal the defendant insists that this rule of law improperly shifts part of the burden of proof from the Government to him." (Emphasis supplied)

The petitioner understands this language as authority for belief by the Government in future cases, that it is unnecessary to prove beyond a reasonable doubt that additional tax was due from a defendant in prosecutions for violation of Section 145 (b), Title 26 U.S.C. as in the case at bar.

This, however, is in contradiction to longstanding decisions considered fundamental, in principles stated. In *Gleckman* v. *United States,* 80 F. 2d 394, 399, the Circuit Court of Appeals said,

"Undoubtedly, the burden was upon the Government to prove that an income tax was due from Mr. Gleckman for the years in question over and above the amount returned—he could not be guilty of attempting to evade or defeat a tax unless tax was due."

The Court of Appeals for the Seventh Circuit in *O'Brien* v. *United States,* 51 F. 2nd 193 at 196 said:

"A prosecution for a wilful failure to file a return might be maintained although there was in fact no tax due. There could, however, be no such prosecution for a wilful attempt to evade or defeat a tax unless there was some tax due from the taxpayer. Moreover, there could be a successful prosecution for a wilful attempt to evade a tax even though the accused filed his return."

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The rules and the fundamental law governing the burden of proof cannot be really and substantially different in criminal prosecutions concerning taxes than in other criminal prosecutions. The shifting of the burden of proof is no less subject to condemnation because it is called the burden of going forward with the evidence.

While the case at bar is not a net worth case, it is, like a net worth case, wholly dependent on circumstantial proof. In *Holland* v. *United States,* 348 U.S. Adv. Sheets 121, 99 L. Ed. Advance Sheets 127, 137, 139, decided December 6, 1954, this Court prescribed a standard for judging the Government's diligence and good faith in the investigation of leads and the possible penalty for failure of the Government to fairly show its investigation of the leads. At Page 137 this Court said:

> "Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer . . . leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence. When the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government. It is a procedure entirely consistent with the position long espoused by the Government, that its duty is not to convict but to see that justice is done."

At Page 139 this Court said:

> "The burden of Proof Remains on the Government. Nor does this rule shift the burden of proof. The Government must still prove every element of the offense beyond a reasonable doubt though not to

> a mathematical certainty. The settled standards of the criminal law are applicable to net worth cases just as prosecutions for other crimes. Once the Government has established its case, the defendant remains quiet at his peril. *Cf.* Yee Hem *v.* United States, 268 U.S. 178, 185, 69 L. ed. 904, 906, 45 S. Ct. 470. The practical disadvantages to the taxpayer are lessened by the pressures on the Government to check and negate relevant leads."

In the case at bar there were leads which could have shown lack of wilfulness, in the knowledge of agents of the Government, not properly demonstrated to the trial Court and the Jury as having been investigated and refuted.

Exhibit 55 (see Appendix P. 13a) was secured by the Government from defendant's accountant during discussion of settlement of tax liability. (R. 284).

The first two sales on that sheet are dated January 7, 1946. The first purchase was dated March 7, sixty days later. Another sale on January 7, 1946 was testified to by a Government witness. The petitioner had no beginning inventory and yet the Government did not in any way show investigation or refutation of the obvious cost of merchandise implicit in these sales.

This investigation could have been made, because it is apparent that the sources of supply to petitioner were known to the Government, else his costs of some $80,849.33, incurred March 7, 1946 and thereafter, would have been attacked and disallowed.

In addition to the evidentiary leads regarding the January 7, 1946 sales, the Government had full knowledge from witness Waller, during investigation, of the return of $6800 worth of merchandise as unsatisfactory and not usable by his company (R. 171, 172). Yet there was no evidence that this was resold or reused, or of any value to petitioner.

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This conviction is not compatible with the standards set up by this Court in the *Holland* case. Despite the evidence, by Government witnesses, which could sustain deduction of some $16,752.80, the Government expert testified to undisclosed receipts of $23,179.30 and a tax deficiency of $13,910.34, and cross-examination as to effect of deductions based on evidence was denied.

There was no sufficient independent proof of wilfulness. There was no proof of pattern. Indeed, the indictment was a single count for a single isolated year in the career of a man admitted to have been diligent and honest in tax dealings prior to and since 1946 (R. 46). The tax reported, for the year involved, was paid in part by refund of $505.88 overpayment by petitioner for 1945, the previous year. No deductions for labor, cartage or any operating cost were claimed in the return involved.

As Justice Minton said, when a Judge of the Seventh Circuit Court of Appeals, "We cannot agree that the defendant should go to prison on suspicion, even though it were a robust suspicion, which this is not.", *United States* v. *Wainer,* 170 F. 2d 603, 606.

The trial Court should have sustained the Motion for Acquittal and the Court of Appeals erred in affirming the denial.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MAURICE J. WALSH
EZRA F. RESSMAN
Counsel for Petitioner

APPENDIX.

IN THE
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11168. OCTOBER TERM, 1954, JANUARY SESSION, 1955.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ABE BENDER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 12, 1955.

Before Duffy, *Chief Judge,* LINDLEY and SWAIM, *Circuit Judges.*

SWAIM, *Circuit Judge.* The defendant, Abe Bender, was convicted, under 26 U.S.C.A. § 145(b), of wilfully and knowingly attempting to evade payment of income tax by filing a false return. This appeal is from that conviction.

The Government's evidence consisted of cancelled checks payable to the defendant, receipted statements of account, and testimony, all of which indicated that the defendant during the year 1946 had gross receipts from the sale of syrup far in excess of the gross income from that source which he reported in his income tax return. The defendant limited his defense to cross-examination of the Government's witnesses and to attacks on the Government's evidence. At the close of the Government's case defendant's counsel announced that the defendant would introduce no evidence.

The defendant first contends that the court erred in denying his motion for acquittal at the close of the Government's case. The ground for the motion was the contention that the Government had not proved beyond a reasonable doubt that there was tax due, which required establishing not only undisclosed income but also a lack of any compensating deductions or exclusions. The defendant seems to contend that the Government here must prove all the facts necessary to show unpaid tax on net income in excess of all business costs and expenses and personal exemptions. But that is not required.

The taxpayer's costs and other factors which would lessen his tax liability are peculiarly within his own knowledge. Accordingly, the law has placed upon him the burden of going forward with the evidence once the Government has established receipts in excess of those reported in his income tax return. As this court said in *United States* v. *Hornstein,* 7 Cir., 176 F. 2d 217, 220: "The figures of cost of goods sold, as they were used in preparing his tax returns, were at least admissions by the defendant which the government could utilize in making a prima facie case. The defendant was chargeable with them until he offered credible evidence to show that the figures were in error, and that his costs were greater."

If the defendant had additional costs or expenses that offset the unreported income established by the Government's case, the burden was on him to prove that as part of his defense. In his brief on appeal the defendant insists that this rule of law improperly shifts part of the burden of proof from the Government to him. But as we have pointed out, the Government satisfies its burden of proof when it shows that the taxpayer has received more income than was reported. It is then the taxpayer's burden to show, if he can, that, even though he received more income than he reported, he does not owe any additional tax. This rule is grounded on the realization that it would be virtually impossible for the Government to show the negative fact that a taxpayer had no unreported deductions or exclusions. In such a case the Government, having shown unreported income, is aided by the pre-

sumption that the deductions and exclusions listed by a taxpayer in his return are all that exist. This presumption is based upon reasonable experience (tax payers would not knowingly fail to report all valid deductions), and has the effect of shifting the burden of going forward with the evidence to the defendant, when the Government has shown unreported income. *Clark* v. *United States,* 8 Cir., 211 F. 2d 100; *United States* v. *Link,* 3 Cir., 202 F. 2d 592; *United States* v. *Zimmerman,* 7 Cir., 108 F. 2d 370.

The presumption may be rebutted by any substantial evidence but, since the defendant introduced no evidence, the jury was justified in finding that there was tax for 1946 which the defendant had not paid.

The defendant claims that the admission of Government Exhibit 55 was error. Exhibit 55 is a work sheet, prepared by defendant's own accountant from cancelled checks, receipts, etc., in the course of preparing defendant's income tax return. It lists all the individual expenditures and income declared by Bender in his syrup business for the year of 1946. The total "Sales" and "Purchases" listed on the Exhibit are the same as those in Bender's tax return.

Defendant's first complaint is that this is an "extrajudicial confession," and as such cannot be used, uncorroborated, to establish part of the *corpus delicti* of the crime charged. This argument finds no support in either the law or the facts involved here. The exhibit was corroborated both by Bender's tax return and by the cancelled checks which were in evidence. Furthermore, as already made clear, the *corpus delicti* of income tax evasion is prima facie established when the Government shows that the defendant has received more money than he reported. This was done before Exhibit 55 was introduced, and defendant did nothing to upset that prima facie case. Since Exhibit 55 was not necessary to establish the *corpus delicti,* it need not have been corroborated. *Auerbach* v. *United States,* 6 Cir., 136 F. 2d 882, 885.

Bender's contention that Exhibit 55 was improperly obtained by the Government is also without merit. The record shows that Government agents did not obtain the work sheet with, as Bender claims, the promise of dropping the criminal charges against him. They obtained it from Mr. Pos to whom Bender had granted his power of attorney. Mr. Pos told Government investigators that he thought the auditor's work sheet contained mathematical errors which would explain the discrepancies between Bender's actual income and that listed on his tax return. The investigators said that if this proved to be true, they would, of course, drop the criminal charges. It was after this conversation that Mr. Pos gave the investigators the work sheet which later became Exhibit 55. As it turned out, the work sheet did not explain the deficiency, and Bender was indicted. There was nothing improper in the Government agents' conduct. Careful examination of the record shows that Bender's attorney, Mr. Pos, gave the document to the Government voluntarily in the hope that it would explain the deficiencies on the tax return. As attorney for the defendant, he had the authority to do this. For another criminal tax case in which the admission of similar evidence, obtained by the Government from the defendant's attorney, was held proper, see *Banks* v. *United States*, 8 Cir., 204 F. 2d 666.

The defendant objects to the limitation placed upon him by the trial judge with regard to his closing argument concerning a $6,800.00 refund he made to one of his syrup customers. The following took place while the defendant's attorney was addressing the jury with regard to the $6,800.00 refund.

> Mr. Walsh: * * * He didn't take that back to resell it. That isn't the inference you must take from the evidence. He took it back because it was no good.
>
> Mr. Kralovec: I object. There is no testimony that it was no good.
>
> Mr. Walsh: The testimony is that it was unsatisfactory merchandise, and I think it is a fair argument.

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Mr. Kralovec: Counsel has stated what he believes is a fact, from the testimony, and there was no such testimony to that effect. It was testified, I submit, that that was reported on the books as a sale. There is no indication or characterization of what condition that merchandise was in.

The Court: I do not recall any evidence of the fact that the goods were not satisfactory, Mr. Walsh. I will sustain the objection and ask the jury to disregard that phase of Mr. Walsh's argument.

Actually the evidence showed that the syrup was returned because it was unsatisfactory. Mr. Waller, Vice President and Treasurer of Sunset, Incorporated, the company which returned the syrup in question, testified that "it was a return of merchandise which we had purchased that we found unsatisfactory." Apparently the defendant was trying to make the jury think that the deficiency in income reported on his tax return should be reduced by $6,800.00 because he had to refund that amount and received in return syrup that was of no value. If this was defendant's purpose, the court was correct in striking out his statement. The evidence we have set out above was that Sunset returned the syrup because it was "unsatisfactory," and to us this means not suited for Sunset's purposes. This description does not necessarily mean that the returned syrup was valueless to the defendant as his term, "no good," would indicate.

The entire objection is without merit, however, because, if the defendant could have reduced by $6,800.00 the amount of the deficiency proved against him, there would still have been some $17,000.00 of unreported income.

The Government introduced witnesses who had done business with the defendant. These witnesses identified statements of accounts received from and checks paid to defendant for goods received, and testified as to the particular transactions in which the Government claimed the defendant received unreported income. On cross-examination the defendant's attorney asked questions about other

transactions between the witnesses and the defendant which had not been mentioned in direct examination, and about the witnesses' business operations in general. The Government's objections to these questions were sustained in each instance and the defendant claims that this was reversible error.

The extent of cross-examination is a matter within the discretion of the trial judge and this court will review the exercise of that discretion only to determine whether or not it has been abused. *Bell* v. *United States,* 4 Cir., 185 F. 2d 302, 310-11; *Wright* v. *United States,* D. C. Cir., 183 F. 2d 821; *United States* v. *Fotopulos,* 9 Cir., 180 F. 2d 631, 640; *Minnehaha County, S. D.* v. *Kelley,* 8 Cir., 150 F. 2d 356, 360-1.

It is the trial judge's duty to so control the presentation of evidence to the jury that it will be as well organized and understandable as possible. The traditional procedure is for the moving party to present its case and then for the defendant to present his defense. As each witness testifies, it is important that the opposing party have an opportunity to test his truthfulness and competency. But it is also important that the regular procedure of the trial be maintained. As a result, each party is allowed to cross-examine his opponent's witnesses but he must ordinarily confine his cross-examination to the subject matter brought out on direct examination. *United States* v. *Fotopulos, supra; Chevillard* v. *United States,* 9 Cir., 155 F. 2d 929, 934-5; *Kincade* v. *Mikles,* 8 Cir., 144 F. 2d 784, 787. If the cross-examiner wants to use the witness to prove other matters, he must wait until it is time to present his case and then call the witness as his own. In this way each party is given an opportunity to challenge the other's witnesses, but the jury is not unnecessarily confused by being presented with evidence as to the contentions of both parties so intermingled as to make the evidence unintelligible.

Under some circumstances extraneous matter may be explored on cross-examination for the purpose of testing

the credibility of the witness. *United States* v. *Lawinski,* 7 Cir., 195 F. 2d 1, 6. The extent to which counsel may go in such an attempt is, again, within the discretion of the trial judge who must balance the party's right to impeach his opponent's witnesses against the need to prevent the confusion which may be created by delving into matters which were not examined in the direct examination.

The trial judge's duty to see that the evidence is presented to the jury in as orderly and understandable a manner as possible requires that he have broad discretion in such matters. The defendant gave no definite reasons for his attempted examinations. He made no offers of proof. In each case he merely said that he thought the questions were proper and in each case the questions sought information on matters not raised on direct examination. We find in this record no abuse of discretion on the part of the trial judge in refusing to permit the witnesses to answer these questions.

The defendant further complains that the Government changed the theory of the case and greatly confused him by amending its bill of particulars several times, the last of which times was the day before the trial. He further complains that the Government introduced evidence of income from sources which were not even mentioned in the bill of particulars.

As regards the amendments, Rule 7(f) of the Federal Rules of Criminal Procedure (18 U.S.C.A.) provides: "* * * A bill of particulars may be amended at any time subject to such conditions as justice requires." Whether or not an amendment should be allowed is in the discretion of the trial court and we will review its decision only for abuse of discretion. *United States* v. *Chapman,* 7 Cir., 168 F. 2d 997, 999.

The bill of particulars listed the income which the Government expected to prove that defendant did not report on his tax rturn. It was amended three times. The first amendment increased the amount allegedly received from one customer and dropped the entire amount

allegedly received from another. The second amendment stated that "The term 'gross income' as used in * * * the Amended Bill of Particulars * * * is intended to have the same meaning as the words 'gross receipts' and 'gross payments.'" The day before trial the court ordered, on motion of the Government, "that leave be and is hereby given to the Government to withdraw all of the assertions contained in the Supplemental Amended Bill of Particulars [second amendment] and to re-affirm all of the assertions made in the Bill of Particulars * * *." This last minute defining and redefining of terms had no effect on the matters necessary for Bender's defense. It did not amount to a surprise allegation which defendant was not given time to meet. It was therefore not an abuse of the trial court's discretion to allow these amendments to be made.

Of all the objections now made to the introduction of evidence of facts not included in the bill of particulars, a careful review of the record shows that the defendant objected to such evidence only once during the trial. We will not review the admission of evidence to which there was no objection made at the trial. *Boyle* v. *Bond,* D. C. Cir., 187 F. 2d 362; *Mutual Benefit Health & Accident Association* v. *Francis,* 8 Cir., 148 F. 2d 590. The admission of evidence of facts not shown by the bill of particulars certainly did not constitute such obvious or damaging error that we must notice them in the absence of proper objections.

The defendant did object, however, to the admission of evidence concerning money received from the Jerome Company which was not mentioned in the bill of particulars. The Government made its case by proving all the income received by Bender from the sale of syrup and comparing that with the amount declared on his income tax return. The bill of particulars purported to list only that income which was not reported on defendant's tax return. The income from the Jerome Company was listed on Bender's tax return and, therefore, was properly omitted from the bill of particulars. This objection was therefore properly overruled.

Defendant cannot for the first time on appeal object to the instructions given to the jury by the trial court. Rule 30, Federal Rules of Criminal Procedure (18 U.S.C.A.); *United States* v. *Angel,* 7 Cir., 201 F. 2d 531, 534. At the trial the defendant did object in a general way to certain of the instructions, but his objections fell far short of being specific enough to give the trial court an opportunity to correct the alleged errors now complained of on appeal.

The defendant now objects to the court's instructions on three subjects: circumstantial evidence, the proper determination of tax due, and the testimony of a single witness. We will quote from the only statements of the defense attorney that could be construed as giving reasons for his objections, Record 427-8:

> Mr. Walsh: • • • The defendant objects to the statement that the case need not be proved by direct and positive evidence.
>
> The defendant objects to the use of the word "positive" and objects on the ground that the word "positive" may lead the jury to believe that the proof need not be affirmative.
>
> The defendant objects to the statement by the Court that the law demands a conviction in certain instances. Circumstantial evidence is one where it could be identified, contains a statement argumentative and prejudicial to the defendant.
>
> • • • • •
>
> As I heard it, I believe the instruction contained a statement that Krane's testimony was controlling. That may be an error.
>
> The Court: That wording was not used. I think you are mistaken.
>
> Mr. Walsh: I say, I may be mistaken.
>
> • • • • •
>
> Mr. Walsh: It may be that I misunderstood that. I think I probably did.

We find it impossible from the above, to determine what the defendant's objections were and we doubt that the trial judge was able to understand them. The objections

must be called to the trial judge's attention with sufficient specificity to apprise him of the question of law raised by the objector. If the District Court was not given an opportunity to rule on the specific objection, we may not consider it on appeal. *Reeve Brothers* v. *Guest,* 5 Cir., 131 F. 2d 710.

Since we have found no prejudicial errors, the judgment of the District Court is

AFFIRMED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Statutes Involved.

The pertinent provisions of the Internal Revenue Code are:

Sec. 145. Penalties

* * *

(b) Failure to collect and pay over tax, or attempt to defeat or evade eax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

26 U.S.C.A. Sec. 145(b), 52 Stat. 513

* * * * *

Sec. 21. Net income

(a) Definition. "Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

26 U.S.C.A. Sec. 21(a), 52 Stat. 457.

Sec. 22. Gross income

(a) General definition. "Gross income" includes gains, profits and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, or profit, or the transaction of

any business carried on for gain or profit, or gains or profits and income derived from any source whatever. • • •

26 U.S.C.A. Sec. 22(a), 52 Stat. 457, 53 Stat. 575.

Sec. 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

(a) Expenses

() Trade or business expenses.

(A) In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, • • •

26 U.S.C.A. Sec. 23(a), 52 Stat. 460.

Federal Rules of Criminal Procedure.

Rule 30. Instructions

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 52. Harmless Error and Plain Error

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

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EXHIBIT 55
(Filed May 28, 1954)

ABE BENDER
119 No. Parkside

Sales		Purchases			Syrup Transactions	
1/7	4195.80	3/7	Cash	2000 —		73169.67
	2827.50	11	Talden	420 —	6/11	3202.64
3/28	1988.09	15	Grubbins	2000 —		5477.02
21	5655.00	25	HiGrade	3995.94		
4/9	1619.80	4/2		1645.32		81849.33
10	526.50	4		1636.44		
10	990.35	9		411.24		
15	1215.00	9		397.20		
5/7	5760.00	10		800.00		
5/22	5616.00	22		800.00		
5/29	5496.35	5/7		1090.00		
7/2	1852.50	7		950.00		
2	3712.50	8		943.99		
—	4594.50	9		972.00		
10	1291.00	14		650.00		
11	4212.00	17		800.00		
11	687.50	17		500.00		
24	3093.75	21		2000 —		
24	2200.00	21		1100 —		
8/1	4070.80	27		943.99		
19	511.50	6/3		6764.24		
26	975.00	4		850.00		
30	1001.00	7		340.00		
9/9	1859.00	14		7191.06		
10/4	3368.75	19		1955.04		
4	1581.25	24		1011.36		
4	3093.75	26		1217.63		
7	2337.50	7/1		1820.40		
11	2088.75	5		2543.52		
17	4262.50	5		461.37		
21	3300.00	22		3000.00		
12/16	600.00	22		2007.84		
		25		3000.00		
		8/19		577.50		
		21		13.13		
Sales	84583.94	21		499.58		
Cost	81849.33	10/7		1452.00		
Net Profit	2734.61	7		1800.00		
		14		6800.00		
		11/5		487.60		
		12/5		352.99		
		12/27		3967.29		
				73169.67		

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 658

ABE BENDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–10a) is reported at 218 F. 2d 869.

JURISDICTION

The judgment of the Court of Appeals was entered on January 12, 1955,[1] and the petition for rehearing was denied on February 15, 1955. The petition for a writ of certiorari was filed March 17, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

[1] The proceedings in the Court of Appeals are included after page 448 of the Record but have not been independently numbered.

QUESTIONS PRESENTED

1. Whether the trial court improperly curtailed petitioner's argument to the jury.

2. Whether there was plain error in the trial court's instructions on:

(a) circumstantial evidence;

(b) the determination of tax liability;

(c) petitioner's knowledge of the contents of his return.

3. Whether the evidence was sufficient to sustain the conviction.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*— Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned

for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

On March 12, 1953, a one-count indictment was returned against petitioner in the United States District Court for the Northern District of Illinois, Eastern Divison, charging him with having wilfully attempted to evade and defeat a large part of his individual income tax for the calendar year 1946 (R. 2–3). Specifically, the indictment charged the following deficiencies:

	Reported income	Reported tax	Corrected income	Corrected tax
1946	$20,304.71	$6,798.68	$56,743.33	$29,927.37

After a jury trial lasting approximately seven days, petitioner was found guilty as charged (R. 434), and on April 22, 1954, he was sentenced to two years imprisonment and a $5,000 fine (R. 438–439). The Court of Appeals affirmed the conviction (Pet. 1a–10a).

During 1946, petitioner was a partner with his brother, Ben Bender, in a cooperage business, Bender Brothers Cooperage Company (R. 46, 404–405). He was not charged with having failed to report income received from this partnership venture or with having evaded any tax attaching thereto (R. 46). The tax allegedly evaded arose

out of an entirely independent income-producing activity, that of selling a syrup ingredient to rectifiers of liquor (R. 47, 82–83, 107–108, 125, 182, 184). Petitioner conducted this business solely for his own account and without maintaining any bookkeeping records incident to it (R. 325, 404–405). His records consisted only of an assortment of bills and cancelled checks (R. 325).

Petitioner's 1946 return was prepared by a public accountant, Kraus (R. 310). The portion of the return concerning petitioner's syrup dealings was based entirely on the sum of such income and expense data as he personally supplied Kraus (R. 305–307). Petitioner's only interest in the content of the return centered on the profit reported on syrup transactions, and Kraus advised him, before execution of the return, that the profit was $3,734.61 (R. 318–319).

The return reflected syrup sales of $84,587.94 (R. 357). At the trial, the Government introduced documentary evidence, consisting of petitioner's invoices and customer's cancelled checks, establishing additional and wholly unreported syrup sales aggregating $23,179.30 (R. 358–360). This total represented ten sales during 1946 to two separate vendees. Eight of the sales, comprising $21,169, were to Sunset, Incorporated, a rectifier and wholesaler of alcoholic liquors located in Chicago (R. 124–125, 359). Sidney S. Waller, Sunset's vice president and treasurer,

testified that he had negotiated all of Sunset's 1946 syrup purchases from petitioner with the latter personally. (R. 126, 165, 168.)

There being no indication during the investigation (R. 306–307, 326–327) and no evidence at the trial that petitioner's "Cost of Goods Sold" was greater than the sum of $80,849.33 claimed as such on the return prepared from information that he had furnished Kraus (R. 305–307, 331), his failure to declare the additional income derived from the ten unreported sales resulted in the evasion of $13,910.34 in tax (R. 370–372).

Petitioner did not testify and introduced no evidence in his own behalf (R. 376).

ARGUMENT

1. At the trial, Waller, the officer of Sunset, testified that on one occasion in his dealings with petitioner the latter, on October 14, 1946, had refunded $6,800 to Sunset because of its inability to use a certain quantity of syrup that he had previously sold the concern (R. 124–125, 171, 175). The evidence showed that petitioner had claimed the $6,800 refunded to Sunset as a part of his "Cost of Goods Sold" on his 1946 return (R. 331–332, 361–363).

In his closing argument, petitioner attempted to persuade the jury that the syrup involved in the refund to Sunset was "unsalable," "spoiled" (R. 396), and "no good" (R. 402). Government counsel objected to this line of argument on the

ground that there had been no evidence as to the condition of the syrup. The court sustained the objection, stating that it did not recall any evidence of the fact that the goods were not "satisfactory" (R. 402). Petitioner now characterizes the court's adverse ruling on this objection as the "erroneous contradiction of crucial evidence in the record" resulting in denial of his right to trial by jury (Pet. 2).

Although there was evidence that the syrup was "unsatisfactory" to Sunset (R. 175), there was no evidence to support petitioner's argument that the syrup returned by Sunset was "no good" and therefore subject to a loss deduction as worthless stock in trade.

Other than Waller's reference to Sunset's "inability * * * to use" the syrup in question (R. 171) and his further statement that "it was a return of merchandise which we had purchased that we found unsatisfactory" (R. 175), there was no indication of the basis for Sunset's rejection of it and no evidence at all as to the syrup's actual quality or condition as distinguished from Sunset's particular ability to use it.

Of equal importance, in this connection, is the fact that complete concession of petitioner's argument would leave unreported income of approximately $17,000 for 1946. *United States* v. *Calderon,* 348 U. S. 160, 168. Petitioner's recognition of this fatal weakness in his argument is

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manifest from his persistent efforts to infuse significance, amount-wise, into the Sunset refund item of October 1946, by attempting to associate it with three entirely distinct and unrelated syrup transactions that occurred in January 1946 (Pet. 8–10, 14). Petitioner assigns no error relative to these transactions. The trial court permitted him complete latitude of argument in respect to them and his complaint now is concerned only with the jury's apparent rejection of that argument. This affords no basis for using isolated January sales to invigorate the single October refund item.

The trial court's curb on petitioner's argument concerning the worthlessness of the syrup returned by Sunset was not error because the evidence did not support such an argument. Moreover, had the jury accepted the argument the proved deficiency remained substantial in amount.

2. The trial court carefully instructed the jury that they could not convict unless satisfied of petitioner's guilt beyond a reasonable doubt.[2] *Hol-*

[2] "Now, this is a criminal case. The law in such cases is that a defendant comes into court presumed to be innocent, and that presumption protects him until such time, if such time shall come, when the jury shall believe from the evidence in the case, beyond a reasonable doubt, that the defendant is guilty as charged in the indictment, which will go to the jury room with you. You will have an opportunity to read the indictment.

"The guilty [*sic*] of an accused is not to be inferred because the facts proven are consistent with his guilt, but on

land v. *United States,* 348 U. S. 121, 139–140. The court also defined circumstantial evidence and in connection therewith emphasized the quantum of such evidence necessary to the return of a verdict of guilty.[3] Petitioner isolates the final

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the contrary, before there can be a verdict of guilty, you must believe from all the evidence, and beyond a reasonable doubt, that the facts proven are inconsistent with his innocence. If two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt the former, that is to say, the one of innocence.

"The defendant on trial has pleaded not guilty. The law does not require any defendant to prove his innocence. The burden of proving the charges in the indictment rests upon the Government, and you cannot find the defendant guilty unless, from all the evidence, you believe him guilty of the offenses charged in the indictment beyond a reasonable doubt.

"Now, a reasonable doubt which you have heard so much about in this case, is what the term implies, a doubt founded on reason. It does not mean every conceivable kind of doubt. It does not mean a doubt that may be purely imaginary or fanciful, or one that is merely captious or speculative. It means, simply, an honest doubt that appeals to reason and is founded upon reason. If, after considering all the evidence in the case, you have such a doubt in your mind as would cause you, or any other reasonably prudent person to pause or hesitate before acting in a grave transaction of your life, then you have such a doubt as the law contemplates as a reasonable doubt." (R. 416–417.)

[3] "Now, the Government must prove the defendant guilty beyond a reasonable doubt. This need not be done by direct and positive testimony but may be done by what is termed circumstantial evidence which I shall distinguish from the other kind of evidence which is direct evidence.

"Members of the jury, as I just stated, there are two kinds of evidence—direct and circumstantial. Direct evidence is that sort of evidence by which a fact is proved directly and

paragraph of this phase of the court's instructions and characterizes it as plain error and "argumentative of guilt" (Pet. 20).

In its detailed instructions on circumstantial evidence immediately preceding the paragraph excepted to, the court had expressed the test for sufficiency in terms of reasonable doubt. In charging that circumstantial evidence, to be sufficient, must exclude every reasonable hypothesis

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without inference from other facts and is usually given by witnesses who saw, heard, or otherwise observed some particular fact or occurrence. Circumstantial evidence is that sort of evidence by which an inference of an unknown fact is drawn from the existence of known facts.

"For example, if, when you went to bed at night—this is a classic illustration given often in the courts—if, when you went to bed at night, you saw the ground was bare of snow, and in the morning when you awakened you saw the ground covered with snow, while you had not seen the snow fall, nevertheless you can infer from the evidence you see that it had snowed during the night. That is an illustration of what circumstantial evidence is.

"Circumstantial evidence in criminal cases is the proof of such facts and circumstances connected with or surrounding the crime charged as attempt to show the guilt or innocence of the party charged. If the facts and circumstances shown by the evidence in this case are sufficient to convince the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury to find the defendant guilty.

"The law demands a conviction where there is sufficient legal evidence to show a defendant's guilt beyond a reasonable doubt, and circumstantial evidence is legal evidence.

"I should like to add that circumstantial evidence is proof of such facts and circumstances surrounding the acts and conduct of the party charged as to exclude every reasonable hypothesis except guilt" (R. 418–419).

but that of guilt, the court did no more than augment the test for sufficiency that it had previously given. Petitioner did not except to this instruction (R. 425–428). He should not be heard to complain now since its effect, if any, on the jury was to heighten the evidentiary barrier to conviction.

Although superfluous under the circumstances, the court's instruction on the "reasonable hypothesis" test for the sufficiency of circumstantial evidence by no means constituted plain error.

Petitioner's assertion that the trial court committed plain error in its instructions on determination of tax liability is attributable entirely to his misreading of those instructions. He contends that the trial judge instructed that *deductions* from gross income were not pertinent to this case (Pet. 20). The following is the challenged instruction, appearing at page 421 of the record:

> The first step in arriving at the income of an individual upon which the tax is imposed is a determination of the gross income of the individual. Gross income is generally all gains or profits, and income derived from any source whatever, whether from salaries or wages, from professions, trades, and businesses; from sales, from dividends, from interest, or from the transactions of any business carried on for gain or profit, except that from such gains and profits there must be *excluded,* under the provisions of the Revenue Act, certain items which would properly be a part of

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> the gross income if the statute did not require their *exclusion*. These items are not pertinent in this case. [Emphasis supplied.]

The court, in fact, instructed that *exclusions* from gross income, *not deductions,* were not pertinent to this case. Certainly petitioner does not contend that there was any evidence in this case making pertinent the statutory exclusions provided under Section 22 (b) of the Internal Revenue Code of 1939.

Moreover, contrary to petitioner's contention, the trial court did instruct adequately on deductions from gross income.[4] In substance, the in-

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[4] "After determining the gross income of an individual, the next step provided by the statute for arriving at the income upon which the tax is computed is to deduct from the so-called gross income such deductions as the statutes permit; that is, an individual is permitted to deduct from gross income all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade, or business, including a reasonable allowance for salaries or other compensation for personal service actually rendered such individual; also rentals for the use of or possession of property connected with and used in a trade or business; also taxes paid by the individual in the taxable year; also losses sustained during the year for which the individual is not reimbursed by insurance, if such losses are incurred in the trade or business; other losses sustained during the year from which the individual is not reimbursed by insurance if net losses are incurred in any transaction entered into for profit, although not connected with any trade or business, and other deductions.

"After such of these deductions from gross income as the individual is entitled to are made, the amount remaining is net income" (R. 421–422).

struction given touched on all deductions from gross income provided by law. At no time did the court suggest that such deductions were not pertinent to this case.

Finally, on the issue of instructions, petitioner asserts that the trial court erroneously applied the doctrine of *respondeat superior* to this case in giving the following charge (Pet. 21–22, R. 422):

> You may find from the facts that when Abe Bender signed his individual income tax return for the year 1946 that he had knowledge of the contents of that return.

This instruction withdrew no issue from the jury. It merely informed the jury that the evidence would permit a finding that petitioner knew the contents of his return. There was such evidence. For example, the accountant who prepared the return testified that when he presented it to petitioner for signature the latter was interested in knowing his realized profit on syrup sales. The accountant thereupon advised petitioner of the profit figure (R. 318). Petitioner says (Pet. 22) "Under the evidence in the case it was a question for the Jury as to whether Bender, the petitioner, had knowledge of the contents of the return." With this we agree, as did the trial court in instructing (R. 423)—

> * * * it is for you to determine from all the evidence whether the defendant had knowledge of the falsity of his return, if

> you find that the return was in fact false, beyond a reasonable doubt.

Under the instructions given, the question of petitioner's knowledge of the contents of his return was unreservedly left to the jury. His contention to the contrary is simply not supported by the record.

3. Petitioner questions the sufficiency of the evidence in support of the conviction. (Pet. 2.) Specifically, he contends that since the Government failed to prove affirmatively that he did not have greater deductible expenses than the amounts claimed as such on his return, his conviction was secured by improperly shifting the burden of proof to him.

We agree with petitioner that proof of an additional tax owing is essential to a conviction on charges of income tax evasion. (Pet. 24.) When the Government has established a prima facie case, however, the defendant thereafter remains quiet at his peril. *Holland* v. *United States, supra,* pp. 138–139.

Petitioner's return, insofar as it concerned income and expense incidental to the syrup transactions that he personally conducted, was based exclusively on information that he supplied (*supra*, p. 4). The return reflected gross income from syrup sales of $84,583.94 (R. 360), a "Cost of Goods Sold" deduction therefrom of $80,849.33 (R. 330–331) and a resulting profit of $3,734.61

(R. 314). During the investigation, neither petitioner nor his authorized tax representative, Pos (R. 276), indicated to the revenue officers that he had incurred deductible expenses not claimed as such on his 1946 return (*supra*, p. 5).

The Government introduced documentary evidence showing that petitioner had failed to report 1946 syrup sales totaling $23,179.30 (*supra*, p. 4). This evidence is undisputed (Pet. 7) and with it the Government established a prima facie case. *Wolcher* v. *United States*, 218 F. 2d 505, 508 (C. A. 9th).

Since the circumstances fairly indicated that there were no deductible costs to offset the proved unreported sales, it was not incumbent on the Government to adduce further positive evidence to support this negative proposition. *United States* v. *Fleischman*, 339 U. S. 349, 360–364; *Rossi* v. *United States*, 289 U. S. 89, 91–92. This was not a case in which petitioner himself was the only person who could testify in contradiction of the Government's evidence. If he actually had offsetting expenses for syrup purchases, his suppliers were certainly available to him as witnesses.

Where the Government, as here, has established unreported gross income in substantial amount and has allowed all deductions that the taxpayer claimed on his return, a reasonable jury may, in the absence of evidence showing additional and unclaimed deductions, conclude beyond a reason-

able doubt that there were no additional deductions and that, therefore, additional taxes were due and owing. See *United States* v. *Link,* 202 F. 2d 592, 593–594(C. A. 3d); *United States* v. *Hornstein,* 176 F. 2d 217, 220 (C. A. 7th); *Barrow* v. *United States,* 171 F. 2d 286, 287 (C. A. 5th); *Clark* v. *United States,* 211 F. 2d 100, 103 (C. A. 8th), certiorari denied, 348 U. S. 911; and *United States* v. *Stayback,* 212 F. 2d 313, 317 (C. A. 3d), certiorari denied, 348 U. S. 911.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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